

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.925 OF 2007.

Shankar Yashwant Khot ...Appellant

Versus

Rangrao Krishna Khot & Ors. ...Respondents

Shri Sandesh Patil i/by Shri Prashant P. Jadhav for the Appellant.

CORAM : ABHAY S.OKA, J.
DATED : 03rd December, 2007.

P.C.:

1. Heard advocate for the appellant. The appellant is the original plaintiff. The appellant filed a suit for perpetual injunction contending he was exclusive owner and in possession of one third share out of land bearing survey No.157/1. The suit was filed for injunction restraining the respondents from interfering with the exclusive possession of the appellant-plaintiff.

2. It is not in dispute that the larger property i.e land bearing survey No.157/1 was held by Rama. Rama had three sons Yashwant, Dattu and Krishna. Dattu died leaving behind no heirs. The present appellant-plaintiff is the only son of Yashwant and the respondents herein are sons of deceased Krishna. It is not in dispute that deceased Rama had executed a

mortgage in respect of larger property in favour of one Anna. According to the case of the appellant his father Yashwant got property redeemed from the mortgage by getting the Reconveyance Deed from the mortgagee and hence he became the absolute owner of the larger property. The appellant claims one third share in the larger property. The case of the respondents in their written statement was that the larger property was ancestral property in the hands of Rama and therefore redemption of mortgage by Yashwant was on behalf of joint family and therefore, the respondents being the heirs of the brother of Yashwant are co-owners of the larger property and in absence of any partition, the appellant cannot claim that he is in possession of a specific portion of the larger property to the exclusion of the others.

3. The trial Court held that the appellant has established that he is the owner of the suit property as the respondents have not rebutted the evidence laid by the appellant. The appellate Court has reversed the said decree on the ground that the respondents were co-owners and therefore there could not be any injunction against co-owners.

4. The learned advocate for the appellant invited

my attention to the pleadings and notes of evidence. He submitted that apart from the fact that the respondents did not step into witness box for proving that Yashwant redeemed mortgage by utilising the funds of the joint family there was no specific challenge to the finding recorded by the trial Court accepting the exclusive ownership of the appellant. He submitted that when the reconveyance deed was obtained by Yashwant, burden to prove that the funds of the joint family were utilised for obtaining reconveyance deed was on the respondents and they have failed to discharge the said burden as they have not led evidence.

5. I have carefully considered the submissions. It is not in dispute that the larger property of which suit property is a small part was the ancestral property in the hands of Rama. The father of the appellant-plaintiff and the father of the respondents are the sons of deceased Rama. It is also an admitted position that the larger property was mortgaged by deceased Rama in favour of one Anna. It is pertinent to note that in the plaint there are no averments that the property was redeemed by deceased Yashwant by using the funds from his own earnings. Infact, there are no averments to show as to how Yashwant became the execulsive owner of the suit property.

6. Even if said lacuna in the plaint is to be ignored, when the appellant stepped into witness box he was fully aware of the stand taken by the defendants. In the examination-in-chief there is no even an assertion that his father Yashwant redeemed mortgage by utilising his own funds. In the cross-examination there is an admission that during the life time of deceased Rama, Yashwant, Krishna and their brother Dattu were jointly enjoying the larger property. Therefore, the burden to show that the property was redeemed by deceased Yashwant by utilising his own funds was on the appellant. The said burden has not been discharged for the reasons which are stated above. Therefore, the appellate Court came to the conclusion that the status of the suit property was that of a joint family property being the property held by the common ancestral Rama. That is the reason why the appellate Court has held that the appellant is disentitled to injunction against co-owners. No substantial question of law arises. Second Appeal is accordingly dismissed. No orders as to costs.

JUDGE